

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On appeal counsel asserts that OWCP improperly denied appellant's request for a merit review.

FACTUAL HISTORY

On October 12, 2014 appellant, then a 62-year-old health aid, filed an occupational disease claim (Form CA-2) alleging that his right shoulder pain was employment related. He indicated that he first became aware of this condition and its relationship to his employment on July 11, 2012. Appellant stopped work on October 15, 2014.

In support of his claim, appellant submitted an incident report for a June 29, 2012 right shoulder injury and medical evidence including physical therapy notes covering the period November 9 to August 23, 2012.

In an August 2, 2012 progress note, Dr. Abhisek K. Das, an examining physician, noted appellant was seen for right shoulder pain complaints and he provided examination findings. Dr. Marilyn S. Pacheco, an attending Board-certified physiatrist and spinal injury medicine physician, reviewed and concurred with the consult note by Dr. Das.

By development letter dated November 3, 2014, OWCP informed appellant that additional evidence was necessary to establish his claim. It advised him regarding the medical and factual evidence necessary. Appellant was afforded 30 days to submit additional evidence.

In response to OWCP's development letter, appellant resubmitted an incident report for a June 29, 2012 right shoulder injury, physical therapy notes, acupuncture notes, and August 2, 2012 progress note from Dr. Pacheco.

By decision dated January 12, 2015, OWCP denied appellant's claim for compensation. It found that he had not provided a physician's opinion which established that a diagnosed medical condition resulted from his federal employment.

In a letter dated January 15, 2015, appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on July 17, 2015. At the hearing appellant testified that he was alleging a traumatic injury claim rather than an occupational disease claim. He described how he injured his right shoulder on June 29, 2012.

In a July 16, 2015 note, Dr. Zinaida Levandovsky, an attending Board-certified internist, related that appellant had right shoulder pain and physical limitations.

By decision dated September 30, 2015, OWCP's hearing representative found that appellant's claim should be converted to a traumatic injury claim rather than an occupational disease claim as appellant attributed his condition to a June 29, 2012 incident. She found the evidence established that the June 29, 2012 incident occurred as alleged, but that the record was

devoid of any medical evidence containing a diagnosis. Thus, the hearing representative found appellant had failed to establish fact of injury and affirmed the January 12, 2015 decision as modified.

On January 7, 2016 appellant, through counsel, requested reconsideration and submitted the additional evidence.

In an October 19, 2015 progress note, Dr. Vishal Kamani, an attending physiatrist, noted appellant's history of injury, as well as his medical history. He provided examination findings, and diagnosed right shoulder pain.

In an October 19, 2015 progress note, Dr. Levandovsky diagnosed right shoulder rotator cuff dysfunction, impingement and right upper traps/levator muscle tightness based on physical examination findings, patient history, and review of appellant's diagnostic testing.

By decision dated August 2, 2016, OWCP found that appellant had established that the alleged traumatic incident occurred as alleged and that he had been diagnosed with upper extremity conditions. However, it denied the claim as appellant had not established causal relationship between his diagnosed medical conditions and the accepted employment incident.

On August 1, 2017 appellant, through counsel, requested reconsideration and submitted additional evidence.

A June 19, 2017 magnetic resonance imaging (MRI) scan of appellant's right shoulder noted full-thickness supraspinatus tendon tear, partial thickness long biceps tendon tear, subscapularis tendon tearing, and moderate supraspinatus and subscapularis muscle atrophy.

In a July 31, 2017 report, Dr. Neil Allen, a Board-certified neurologist and internist, diagnosed right shoulder impingement syndrome. He attributed the diagnosed condition to appellant's work duties of lifting heavy patients, pushing and pulling gurneys and wheelchairs, and lifting and retrieving heavy medical equipment. Dr. Allen explained how these types of activities are documented in medical literature as causing shoulder impingement syndrome.

By decision dated September 7, 2007, OWCP found that the evidence of record was insufficient to warrant merit review of the decision dated August 2, 2016 as the evidence submitted with the request for reconsideration was irrelevant or immaterial and thus had no bearing on the issue, or was inconsequential to the issue of causal relationship.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new

evidence not previously considered by OWCP.³ Section 10.608(b) of OWCP's regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(3), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.⁴

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record⁵ and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.⁶

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On August 1, 2017 appellant requested reconsideration of an August 2, 2016 decision that denied modification of the denial of his traumatic injury claim.

OWCP reviewed appellant's request for reconsideration under the appropriate criteria for timely filed reconsideration petitions. Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did he advance a relevant legal argument not previously considered by OWCP.⁷ As such, he was not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(3).⁸

A claimant may also be entitled to a merit review by submitting relevant and pertinent new evidence.

The underlying issue on reconsideration is medical in nature, whether appellant's diagnosed right upper extremity conditions were causally related to the accepted June 29, 2012 employment incident. Appellant submitted a new report dated July 31, 2017 from Dr. Allen which noted appellant's work duties and diagnosed right shoulder impingement syndrome due to his employment duties. This report, however, offered no opinion explaining how appellant's accepted June 29, 2012 employment incident caused or aggravated right shoulder impingement syndrome. Appellant also submitted a June 19, 2017 MRI scan diagnosing right shoulder conditions, but which also did not offer an opinion on the cause of the conditions. The Board has held that

³ 20 C.F.R. § 10.606(b)(3); *J.T.*, Docket No. 18-0087 (issued February 14, 2018); *D.K.*, 59 ECAB 141 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006).

⁴ *Id.* at § 10.608(b); *see K.H.*, 59 ECAB 495, 499 (2008); *Tina M. Parrelli-Ball*, 57 ECAB 598 (2006).

⁵ *R.H.*, Docket No. 17-0876 (issued November 21, 2017); *Richard A. Neidert*, 57 ECAB 474 (2006).

⁶ *M.P.*, Docket No. 17-0653 (issued July 20, 2017); *D'Wayne Avila*, 57 ECAB 642 (2006).

⁷ *See J.F.*, Docket No. 16-1233 (issued November 23, 2016).

⁸ 20 C.F.R. § 10.606(b)(3).

evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁹

Appellant's reconsideration request failed to show that OWCP erroneously applied or interpreted a point of law, nor did it advance a point of law not previously considered by OWCP. Appellant also did not submit relevant and pertinent new evidence. Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied his request for reconsideration of the merits of the claim.

On appeal counsel presented arguments relative to the merits of the case. However, as a nonmerit review, the Board does not have jurisdiction over the merits of the case on this appeal.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim under 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 7, 2017 is affirmed.

Issued: May 10, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board